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No. 86

In the Supreme Court of the United States

OCTOBER TERM, 1930

JACOB O. BENDER, COLLECTOR OF INTERNAL REVENUE,
PETITIONER

v.

WILLIAM PFAFF

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Louisiana (R. 16–26) is reported in 38 F. (2d) 642. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 31–33) is reported in 38 F. (2d) 649.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 28, 1930. (R. 34.) Petition for certiorari was filed April 17, 1930. Certiorari

was granted May 26, 1930. (R. 35.) Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the entire community income for the year 1927 of a husband and wife domiciled in the State of Louisiana is taxable as the income of the husband; or, to state it another way, whether the wife has such an interest in the community income that she has the right to report one-half of such income in her separate return.

STATUTES INVOLVED

The relevant portions of the statutes involved will be found in the Appendix, *infra,* pp. 46-49.

STATEMENT

The case was tried in the District Court on an agreed statement of facts, a jury trial having been waived in writing. The facts as stipulated are substantially as follows:

The respondent has always been a citizen of the United States and a resident of the State of Louisiana. He was married on October 21, 1891, and since then he and his wife have resided together in that State. (R. 10.)

Neither owned any property or pecuniary rights at the time of their marriage and neither has since acquired any paraphernal or separate property. (R. 10.)

Prior to January 1, 1927, the respondent and his wife had accumulated a considerable amount of property consisting of real estate in the city of New Orleans, stocks of various corporations and other personal property. The title to all of the property referred to stood in the name of the respondent. It is admitted that such property and all of the income derived therefrom constituted the community property of the respondent and his wife. (R. 11.)

The gross income of the respondent and his wife consisted of the following items (R. 11):

Rents and royalties from community real estate	$11,232.65
Dividends on community stocks	3,142.25
Salary of respondent as an officer and employee of several corporations	27,025.00
	41,399.90

Allowable deductions for the year amounted in the aggregate to $10,873.64. (R. 11.)

The respondent and his wife filed separate income tax returns for 1927 in which each reported a gross income of $20,272.61, allowable deductions of $5,009.48 and a net income of $15,263.13. The respondent's return showed a tax due of $341.55 and the wife's return, a tax due of $430.17. These amounts were paid. (R. 12.)

It is conceded that all of the income reported in the returns of the husband and wife constituted community income and that if the respondent and his wife were entitled to report the community income and deductions in the manner indicated the

liability disclosed by their returns was correct. (R. 12.)

Upon the audit of the returns, the Commissioner of Internal Revenue determined that the entire income in question should have been reported by the respondent, that all the deductions should have been taken by him, and that his tax should be computed accordingly. Thereafter an additional assessment of $1,348.50 was duly made against the respondent and was paid by him under protest to the petitioner, as Collector of Internal Revenue for the District of Louisiana, together with $32.51 interest, making a total payment of $1,381, for the recovery of which a claim for refund was duly filed. (R. 12–13.)

Upon the rejection of the claim this suit was brought. (R. 13.)

The District Court entered judgment for the respondent. (R. 26.) Upon appeal the Circuit Court of Appeals for the Fifth Circuit affirmed the decision of the lower court. (R. 34.)

This Court granted certiorari on May 26, 1930.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In not holding that under the laws and judicial decisions of the State of Louisiana the husband has such control over the community income that he should properly be required to report all of such income in his Federal income tax return for 1927.

2. In holding that the wife has such an interest in the community income that she and her husband are permitted to divide the community income between them in separate returns.

SUMMARY OF ARGUMENT [1]

This Court in the case of *United States* v. *Robbins,* 269 U. S. 315, held that a married man domiciled with his wife in the State of California should be taxed upon all of their community income, basing its decision in part on the fact that the husband alone could dispose of the fund and exercise exclusive rights of management and enjoyment over it.

In *Corliss* v. *Bowers,* 281 U. S. 376, this Court again emphasized that the individual might be taxed on income which he had the right to control and enjoy irrespective of whether he held any title whatever to the fund from which it was derived.

Taxation of income to the person who controls and enjoys it, rather than to the person who holds title to the property from which it is derived, is a principle which is recognized in various provisions of the Revenue Acts. The *Corliss case* involved the constitutionality of Section 219 (g) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 277 (U. S. C., Title 26, Sec. 960), providing for the taxation of the income of revocable trusts to the grantors. Section 219 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 32

[1] The following material to stars on p. 6 is common to all of our briefs in *Poe* v. *Seaborn*, No. 15; *Hopkins* v. *Bacon*, No. 84; *Bender* v. *Pfaff*, No. 86; *Goodell* v. *Koch*, No. 106.

(U. S. C. App., Title 26, Sec. 960), provides for taxing the income of certain types of trusts to the trustees, the income of other types to the beneficiaries, and the income of revocable trusts to the grantors.

Sections 210 and 211 of the Revenue Act of 1926, *infra*, p. 46, construed as similar provisions were construed in the *Robbins case*, do not require the taxation of income to the individual having purely formal rights of ownership. Their intent is that the tax shall fall upon the person exercising substantial rights of dominion and enjoyment.

In the *Robbins case* the rights of dominion and enjoyment were measured by very practical tests as to what the husband and wife could do with respect to the community income. The possession of unimportant rights by the wife will not suffice to prove that one-half of the community income should be taxed to her, for wives in States not having the community property system also may restrict to a certain extent the husband's disposition of his property and income. The Act should, if possible, be so construed and applied as not to give married taxpayers residing in the community-property States an undue advantage over married taxpayers residing in other States.

* * * * * [2]

During the existence of the community the Louisiana husband alone has unrestricted power

[2] See footnote 1, p. 5.

to make contracts and bring suits relating to community property and to sell or otherwise dispose of it except for a limitation upon his power to make gifts and a prohibition against his defrauding his wife.

The community property is subject to the payment of the separate debts of the husband incurred during the existence of the community, but is not liable for the separate debts of the wife, and the husband and his separate estate become personally liable for all community debts whenever there is an insufficient amount of community property to pay them.

The wife has no power to make contracts or create obligations relating to the community without her husband's consent. She is not personally liable for the community debts during the existence of the community and upon its dissolution by divorce, by separation from bed and board, or by separation of property made by judicial decree under Article 2425 of the Revised Civil Code of Louisiana, *infra,* the wife may avoid becoming liable for any of the community debts by renouncing the community or by consenting to accept, under inventory, one-half of the community remaining after the payment of community debts.

The wife can put an end to the community by securing a divorce, a separation from bed and board, or a separation of property under Article 2425, *infra,* but she has no remedy against the hus-

band for mismanagement of the community property without dissolving the community. She cannot substitute her management of the community property for his, interfere with his management or demand a share of the community income. Accordingly, the husband has all of the present power over the community income and should be taxed upon the entire amount.

ARGUMENT

I

Preliminary Statement [3]

The Treasury Department, following two opinions of the Attorney General, 32 Op. A. G. 298, 435, originally conceived that the characterization of the wife's interest in community property as vested or expectant determined whether the husband and wife might divide the community income between them in separate returns or whether the husband should be required to report the entire amount in his return. See T. D. 3071, Internal Revenue Cumulative Bulletin, No. 3, p. 221; T. D. 3138, Internal Revenue Cumulative Bulletin, No. 4, p. 238. It was accordingly held that a husband and wife domiciled in the States of Washington, Texas, Louisiana, Arizona, Nevada, New Mexico,

[3] The entire argument under Points I and II is common to all of our briefs in *Poe* v. *Seaborn*, No. 15; *Hopkins* v. *Bacon*, No. 84; *Bender* v. *Pfaff*, No. 86; *Goodell* v. *Koch*, No. 106.

and Idaho should be permitted to divide the community income between them in separate returns, while a similar privilege was denied to married taxpayers domiciled in California.[4]

Subsequently this Court, in the case of *United States* v. *Robbins,* 269 U. S. 315, indicated that the question as to whether community income shall be taxed to the husband alone or to the husband and wife in equal shares can not be made to depend solely upon whether the wife's interest is vested or expectant, and that in California, where the husband has substantially the sole right to control and enjoy the community property, the community income is properly taxed to him.

Following the decision in the *Robbins case,* the opinions of the Attorney General as to the taxation of income in the community property States were withdrawn (35 Op. A. G. 265), with the recommendation that the Treasury Department take action which would furnish grounds for the commencement of test suits to determine the proper method of taxing community income, the case at bar being one of the cases which has resulted from such action.

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[4] This procedure was subsequently given retroactive legislative approval as to 1925 and prior years by Section 1212 of the Revenue Act of 1926, *infra*, p. 47. That section was not intended to apply to taxes for subsequent years, and has no bearing on the question here involved.

II

Where the Husband Has Control Over and the Right to Enjoy the Entire Community Income He Is Required to Include It in His Return for Federal Income-Tax Purposes

In general terms the statute imposes the tax "upon the net income of every individual" without specification of what is included in these words. There is no reference in the statute to income from community property.[5] Such generality is unavoidable in Federal income tax laws intended to have uniform application throughout the States where the definitions of property rights and titles vary with the local laws. The view originally held in the Treasury Department and in the Department of Justice (T. D. 3071, *supra;* T. D. 3138, *supra;* 32 Op. Atty. Gen. 298, 435, *supra*) that the wife has an interest in income from community property equal to that of her husband and should therefore be permitted to report one-half of it in her return was based upon local conceptions of title to the fund

[5] It is of interest that while the Revenue Acts of 1921 and 1924 were being drafted it was proposed that there should be included in them a provision for the taxation of community income to the spouse having the right of management and control. See Report of the Committee on Ways and Means of the House of Representatives, Report No. 350, 67th Congress, First Session, p. 11, and Conference Report No. 486 of the same Congress, p. 21; Hearings before the Committee on Ways and Means, House of Representatives, 68th Congress, First Session, Revenue Revision, 1924, pp. 194, 348, 349, 375, 478, 482. These proposals were defeated.

rather than of dominion and control of the income therefrom. The contention that the person who has formal title to a fund or to income therefrom must pay the tax when the power of disposition is vested in another finds no support in the language of the statute. Indeed the very generality of the words employed suggests that they are to be understood in their ordinary meaning implying dominion and control and not in any narrow, technical sense implying formal, legal, or equitable ownership.

Section 1 of the Revenue Act of 1916, c. 463, 39 Stat. 756, levied a tax "upon the entire net income received in the preceding calendar year from all sources by *every individual.*" (Italics ours.) Sections 1 and 201 of the Revenue Act of 1917, c. 63, 40 Stat. 300, 303, imposed certain taxes upon the net income *"of every individual."* (Italics ours.) Subsequent Revenue Acts have likewise employed the phrase "of every individual." See Sections 210 and 211 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, the statute involved in the *Robbins case, supra,* and Sections 210 and 211 of the Revenue Act of 1926, *infra,* p. 46.

Nowhere in the Revenue Act of 1926 nor in any previous Revenue Act have there been set forth the proprietary rights which an individual must have in particular income to become liable for the tax thereon. The tax is imposed upon the income of individuals, and the application of this language

to specific cases is to be made as they arise. In this process the *Robbins case* points the way. It does not hold that the principle of taxing income to the "owner" of the income is to be discarded, but rather that ownership in the statutory sense must be tested, in cases of community ownership, by the enjoyment of practical rights of ownership and not by words describing the interests of husband or wife or of "the community" as "vested" or "expectant," "legal" or "equitable."

In its opinion in the *Robbins case* this Court said (p. 327):

> But the question before us is with regard to the power and intent of the Revenue Act of February 24, 1919, c. 18, Title II, Part II, Sections 210, 211; 40 Stat. 1057, 1062. *Even if we are wrong as to the law of California and assume that the wife had an interest in the community income that Congress could tax if so minded, it does not follow that Congress could not tax the husband for the whole.* Although restricted in the matter of gifts, &c., he alone has the disposition of the fund. He may spend it substantially as he chooses, and if he wastes it in debauchery the wife has no redress. See *Garrozi* v. *Dastas*, 204 U. S. 64. His liability for his wife's support comes from a different source and exists whether there is community property or not. *That he may be taxed for such a fund seems to us to need no argument. The same and further considerations lead to the conclusion that it was intended to tax him for the whole.* For

> not only should he who has all the power bear the burden, and not only is the husband the most obvious target for the shaft, but the fund taxed, while liable to be taken for his debts, is not liable to be taken for the wife's, Civil Code, Sec. 167, so that the remedy for her failure to pay might be hard to find. The reasons for holding him are at least as strong as those for holding trustees in the cases where they are liable under the law. Sec. 219. See Regulations 65, Art. 341. (Italics ours.)

Again, in the case of *Corliss* v. *Bowers*, 281 U. S. 376, this Court recognized that the legal estate was in the trustee and the equitable interest was in the grantor's wife, but nevertheless held the grantor to be taxable upon the income under Section 219 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 277 (U. S. C., Title 26, Sec. 960), which provides for the taxation of the income from revocable trusts to the grantor. In holding this provision to be constitutional, the Court said (p. 378):

> But taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid. If a man directed his bank to pay over income as received to a servant or friend, until further orders, no one would doubt that he could be taxed upon the amounts so paid. It is answered that in that case he would have a title, whereas here he did not. But from the point

> of view of taxation there would be no difference. The title would merely mean a right to stop the payment before it took place. The same right existed here, although it is not called a title but is called a power. The acquisition by the wife of the income became complete only when the plaintiff failed to exercise the power that he reserved. *Salstonstall* v. *Salstonstall,* 276 U. S. 260, 271. *Chase National Bank* v. *United States,* 278 U. S. 327. *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339. Still speaking with reference to taxation, if a man disposes of a fund in such a way that another is allowed to enjoy the income which it is in the power of the first to appropriate it does not matter whether the permission is given by assent or by failure to express dissent. The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not.

Sections 210 and 211 of the Revenue Act of 1926, *infra,* p. 46, construed as the corresponding sections of the Revenue Act of 1918 were construed by the Court in the *Robbins case,* do not require the taxation of income to the individual having purely formal rights of ownership, their intention being to tax the person having the substantial right to exercise control and enjoyment of the income.

Taxation of income to the person who controls and enjoys it, rather than to the person who holds title to the property from which it is derived, is a

principle which is recognized in various provisions of the Revenue Acts. The *Corliss case*, as previously indicated, involved the constitutionality of a statute taxing the income of a revocable trust to the grantor. Congress has also provided for the taxation of the income of trusts to the beneficiaries in cases where the income is distributable to them and for the taxation of the income of other trusts to the trustees. See Section 219 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 32 (U. S. C. App., Title 26, Sec. 960), and the corresponding provisions of earlier statutes. This device for the taxation of the income from trusts was in effect prior to the decisions in the *Robbins case* and the *Corliss case*. Thus Congress itself did not intend that the imposition of a tax on the net income "of every individual" should always require that the holder of the legal title be taxed or that the holder of the equitable title be taxed, but rather that in proper cases the tax should be imposed upon the person having control of the income.

Not only have the *Robbins* and the *Corliss cases* established the principle that the individual is taxed upon income over which he can exercise rights of dominion and enjoyment rather than upon income to which he has a bare legal or equitable title, but the *Robbins case* has measured the rights of dominion and enjoyment by exceedingly practical tests. It is emphasized in that decision, for example, that the husband alone had the disposition

of the fund; that he might spend it substantially as he chose, and that if he wasted it in debauchery the wife had no redress; that his liability for his wife's support came from a different source and existed whether there was community property or not, and that the community property, while liable to be taken for his debts, was not liable to be taken for his wife's.

An application of the same principle was made in *Lucas* v. *Earl,* 281 U. S. 111, where it was held that an agreement, assumed to be valid, between husband and wife domiciled in California that each should have an equal joint interest in all their earnings could not operate to make one-half of his salary taxable to her as her income because he earned the income and had the right to collect it.

In any event, under these decisions it is settled that the rights of ownership which the person taxed must be able to exercise are substantial rights and among such substantial rights are the rights of disposing of the income or the source of the income and the right to control the use of the income.

This test rests solidly upon the controlling purpose of the law to create a national system for the taxation of incomes without discrimination between taxpayers in the several States. The imposition of the tax "upon the net income of every individual" implies uniformity and equality in administration. But there can be neither unless the law looks through formalities of title to the rights

and powers of individual taxpayers in controlling and disposing of income received. "The power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions." *Tyler* v. *United States,* 281 U. S. 497, 503. If married persons in the State of Louisiana, because of their community of interest in property which either may acquire during wedlock, are taxed upon their incomes at lower rates than married people in other States who enjoy substantially the same rights and powers with respect to the control and disposition of income, the purpose of the law will be defeated. The family is the social and economic unit upon which the burden of the tax must fall and the injustice of such inequalities in the administration of the law is apparent. Unless the tax falls ratably upon all income over which the taxpayer exercises dominion and control, uniformity in administration is unattainable and inequality becomes inevitable. Such results are to be avoided if language permits. *Boston & M. R. R. Co.* v. *United States,* 245 Fed. 578 (C. C. A. 1st), certiorari denied, 255 U. S. 577; *United States* v. *Childs,* 266 U. S. 304, 309. The test that he who has the power of disposition should bear the burden of the tax finds support in the general language of the statute and to so construe it effectuates the purpose of the law. Furthermore, this test is appropriate to the power and purpose of Congress in the imposition of taxes to deal

with the substance of things regardless of formal legal fictions, a purpose which this Court has often recognized. *United States* v. *Robbins*, 269 U. S. 315; *Corliss* v. *Bowers*, 281 U. S. 376; *Tyler* v. *United States*, 281 U. S. 497; *Chase National Bank* v. *United States*, 278 U. S. 327; *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339.

It is necessary, therefore, to examine the laws and the judicial decisions of the State of Louisiana and to determine what substantial rights of ownership the husband and wife may exercise; that is, precisely what the husband may do and what he has a right to have done with respect to community property and income, and to make a like determination with regard to the wife.

III

Under the Laws and Judicial Decisions of the State of Louisiana the Husband's Interest in the Community Income Is Such that He Should Properly Be Required to Report the Entire Amount in His Return; the Wife's Interest Is Not Such That She Should Be Permitted to Report One-half of the Community Income in Her Return [6]

The decision must turn upon consideration of the laws of the State affecting community property and of the respective rights of the husband and

[6] The following material to stars on p. 23 is common to all of our briefs in *Poe* v. *Seaborn*, No. 15; *Hopkins* v. *Bacon*, No. 84; *Bender* v. *Pfaff*, No. 86; *Goodell* v. *Koch*, No. 106.

wife to have control and dominion over such property and its income. But in approaching this consideration it is necessary to bear in mind that certain limitations upon the husband's power to deal, even with his own property, universally arise from the marital relationship and the husband's obligation to support his wife and make provision for her support after his death. Thus a limited right in the wife to bind the community by contacts for necessities is not a substantial right and should be disregarded, for it is comparable to the right which the wife had at common law to obtain necessities on the credit of the husband and to bind his separate property. *McFerren* v. *Goldsmith-Stern Co.*, 137 Md. 573, and cases cited. Nor is a limited right to prevent a particular disposition of the community income or property by the husband important, for similar rights are enjoyed by wives in States which do not have the community-property system. There is, for example, a Utah statute providing that no assignment of the husband's wages shall be valid unless assented to by the wife in writing. Compiled Laws of Utah, 1917, Par. 4385. It would scarcely be urged that the possession of such rights by a wife would afford sufficient reason for taxing a part of the husband's income to the wife.

Nor would it be important if the wife could prevent her husband from disposing of more than one-half of the common property by will. This

gives the wife no greater right (except as to the amount) than she has in Oklahoma where the husband is prevented from bequeathing away from his wife so much of his estate that she would receive less than what would be obtained by succession at law. Act of April 9, 1925, amending Section 11224 of the Compiled Statutes of Oklahoma, Session Laws, 1925, p. 30.

Similarly, in Minnesota (omitting reference to some unimportant exceptions and special provisions) the widow is entitled—subject to the payment of the husband's debts and expenses of administration—to one-third of the personal property then belonging to his estate and one-third of all real estate (other than the homestead, in which she is entitled to a life estate) of which he shall have been seized during coverture, the conveyance of which she has not assented to in writing. General Statutes, Minnesota, 1923, Sections 8718–8720, 8726.

So far as we have been able to ascertain every State in the Union which does not have a community property law, with the exception of North Dakota and South Dakota, makes some positive provision for the widow in relation to the husband's real estate and even the States mentioned protect the wife's interest in the homestead. In practically all States, provisions which give to the wife the assurance of receiving a certain proportion of the husband's real estate upon his death are accom-

panied by provisions which prevent him from conveying his real estate without her consent during his life in such a way as to defeat her dower or other statutory interest.

In the consideration of the local law, local "refinements of title" should be ignored and enquiry should be directed, in the language of the *Corliss case,* to "actual command" of the income taxed, so that, in accordance with the decision in the *Robbins case,* the statutory intent that he who has all the power shall bear the burden may be accomplished. This enquiry will find conclusive answer in the statutes and prevailing decisions of the State, but the subject matter is of ancient origin and the precedents should be read with the prevailing conception of the husband's right of command over community property and income always in mind. For this purpose no better statement can be found than what was said by this Court in *Garrozi* v. *Dastas,* 204 U. S. 64, 78:

> The question, therefore, is this: Is the power of the husband, as the head and master and administrator of the community, in its nature so restricted that in the absence of express limitation he can, after the dissolution of the community, be called to account and compelled to return to the community money which he has actually expended during the existence of the community, because, in the judgment of a court, such expenses may be deemed to have been not

suitable to his situation in life, extravagant, or even reckless? To answer this question in the affirmative would be to destroy the whole fabric of the community system as prevailing, not only under the Spanish and Porto Rican Codes, but as obtaining in those countries of the continent of Europe and here where that system prevails. We need not consider whether the community was derived from the Roman law, from an express provision of the early Saxon law, or from the ancient customary law of the continent. For, however derived, the very foundation of the community and its efficacious existence depend on the power of the husband, during the marriage, over the community, and his right, in the absence of fraud or express legislative restriction, to deal with the community and its assets as the owner thereof. The purpose of the community, as expounded from the earliest times, whilst securing to the wife on the dissolution of the marriage an equal portion of the net results of the common industry, common economy and common sacrifice, was yet, as a matter of necessity, during the existence of the community, not to render the community inept and valueless to both parties by weakening the marital power of the husband as to his expenditures and contracts, so as to cause him to be a mere limited and consequently inefficient agent. (See a very full citation of authority in Journal du Palais Repertoire, verbo, communauté, 739, 741, *et seq.*)

> In determining the authority of the husband as to the common property two considerations are essential: The character of the right of the wife to the common property during the existence of the marriage and the scope of the power of the husband during the same period.

With these preliminary considerations in mind, we turn to the statutes and judicial decisions of the State of Louisiana which disclose the rights of the spouses to control and enjoy community property and its income.

* * * * * [7]

A preliminary statement of certain outstanding features of the community property system of Louisiana will serve to make more intelligible the rights of dominion and enjoyment possessed by the husband under that system.

The community of acquets and gains exists between a husband and wife domiciled in Louisiana unless they agree in their marriage contract that it shall not exist or by agreement prior to marriage limit or modify the community system. See Articles 2332, 2392, 2399, 2400, 2401, and 2424 of the Revised Civil Code, *infra; Succession of Le Besque,* 137 La. 567. The husband and wife can not by voluntary agreement alter the community of acquets and gains after the marriage. Once established, it exists by operation of law until dissolved by death, by divorce, by separation from bed and board or

[7] See footnote 6, p. 18.

by a judicial decree making a separation of property in the wife's suit for such a separation instituted under Article 2425 of the Revised Civil Code, *infra*. *Guillot* v. *Guillot*, 141 La. 86.

Under Articles 2334 and 2404, *infra*, the community property includes all property acquired by either spouse during their marriage other than property acquired with separate funds or by inheritance, or by donation made to him or her particularly. It includes the profits and revenues derived from community property, the products of the labor of husband and wife, except earnings of the wife while she is living separate and apart from her husband, or is conducting a trade or business independently of him, and the revenues and profits of the separate property of both spouses except those from the wife's paraphernal property where such property is administered by the wife separately. Articles 2383, 2386, 2402, *infra*. In Louisiana, as in Washington, Arizona, and Texas, there is a presumption that all property acquired during coverture is community property. Article 2405, *infra*; *Busby* v. *Busby*, 168 La. 510.

The Supreme Court of Louisiana has not consistently held that the wife has a present or vested interest in the community property during the existence of the community, but the majority of its later decisions have adopted that view. *Succession of May*, 120 La. 692; *Phillips* v. *Phillips*, 160 La. 813, and cases cited. See *Liebman* v. *Fontenot*,

275 Fed. 688 (W. D. La.). See *contra, Jacob* v. *Falgoust,* 150 La. 21, and cases cited.

Articles 915 and 916 of the Revised Civil Code, *infra,* recognize the right of the husband or wife to dispose of his or her share of the community property by will. But all that either may devise is a one-half interest in the community property existing at the time of the death and remaining after the payment of the community debts. *Succession of May, supra; Theall* v. *Theall,* 7 La. 226; *Thompson* v. *Vance,* 110 La. 26; *Ramsey* v. *Beck,* 151 La. 190. If there is no will, the surviving spouse, under the conditions set forth in Articles 915 and 916, inherits the one-half interest of the other spouse. The rights of the surviving wife and the surviving husband are identical in this regard.

The Louisiana community property system has certain unique features, particularly with reference to the rights of the spouses upon the dissolution of the community. The statute, for example, gives the court awarding a decree of divorce no discretion as to the division of property such as exists under similar circumstances in Washington, Arizona and Texas. See our briefs in the cases of *Poe* v. *Seaborn, supra; George C. Hopkins, Collector of Internal Revenue,* v. *C. W. Bacon;* and *Fred O. Goodell, Collector of Internal Revenue,* v. *I. B. Koch,* Nos. 15, 84 and 106, respectively, on the docket of this Court for the present term. As will be pointed out later, the wife upon dissolution of

the marriage has a certain power to accept or reject the community, but if the wife does not renounce it the court, when it directs a division of the community property, must award one-half to each. Article 2406, *infra.*

Another unique feature is the doctrine of reimbursement under Article 2408 of the Revised Civil Code, *infra,* which provides that where the separate estate of one of the spouses is enriched at the expense of the community, the other spouse may be given an adjustment equivalent to one-half of the value of the increase when the community is dissolved for any cause. This statutory right to reimbursement exists "if it be proved that the increase of ameliorations be the result of the common labor, expenses or industry" but does not exist "if it be proved that the increase is due only to the ordinary course of things, to the rise in the value of property, or to the chances of trade."

If instead of enrichment by purchase the enrichment consists of improvements, it is not the cost of the improvements but the enhanced value of the property constituting the separate estate which constitutes the basis of the claim for reimbursement. *Dillon* v. *Freville,* 129 La. 1005; *Succession of Goll,* 156 La. 910.

Similarly, the community may be enriched at the expense of the separate property of one of the spouses and the enrichment give rise to a claim for reimbursement by one spouse against the other

upon dissolution of the community. For example, in *Whittington* v. *Heirs of Pegues,* 165 La. 151, it was held that where a married woman with the authority of her husband purchased real estate, the presumption that the purchase was for the benefit of the community was not affected by the fact that the purchase price was paid from her separate estate, and that the property became community property, but that the wife acquired a claim for reimbursement against the husband upon dissolution of the community. Similarly, the husband who expends his separate funds on the community property loses his investment to the community, but may acquire a right to reimbursement upon the dissolution of the community if the enhanced value is proved with reasonable certainty. *Munchow* v. *Munchow,* 136 La. 753. There is no accounting upon any claim for reimbursement prior to the dissolution of the community. *Falconer* v. *Falconer,* 167 La. 595.

But these features of the community property system of Louisiana are only important as a background for the determination of the real issue here involved; namely, the relative rights of dominion and control which each spouse exercises with respect to community property and income.

(A)

DURING THE EXISTENCE OF THE COMMUNITY THE HUSBAND ALONE HAS UNRESTRICTED POWER TO MAKE CONTRACTS AND BRING SUITS RELATING TO COMMUNITY PROPERTY AND TO SELL, MORTGAGE, OR OTHERWISE DISPOSE OF IT EXCEPT BY GIFT OR WITH INTENT TO DEFRAUD HIS WIFE

Article 107, Code of Practice, *infra.*
Article 2404, Revised Civil Code, *infra.*
Mitchell v. *Dixie Ice Co.*, 157 La. 383.
Kelly v. *Robertson*, 10 La. Ann. 303, 310.

Under Article 2404 of the Revised Civil Code, *infra,* the husband alone is "the head and master of the partnership or community of gains." During the existence of the community he administers the community property and disposes of the revenues which the community property produces. He may alienate community property "by an onerous title," that is, for consideration, without the consent and permission of his wife.

The right to alienate exists with reference to community real estate as well as personal property. There is no general provision in the Code of Louisiana, such as exists in certain other community property states, requiring the wife to join in the conveyance of the community real estate, and he may dispose of it without even consulting her. *Demarets* v. *Demarets,* 144 La. 173. The only exception is that when title to community property is in the wife's name it cannot be mortgaged or sold without her consent. Article 2334 of the Revised Civil Code, *infra; Gorlick* v. *Dalbey,* 147 La. 18. In any

case, the husband owes the wife no accounting of his disposition of the proceeds of the sale of community property or of the revenues derived from it during the existence of the community. *McCaffrey* v. *Benson,* 40 La. Ann. 10, 16; *Falconer* v. *Falconer, supra.*

The husband is the only legal representative of the community. *Kelly* v. *Robertson,* 10 La. Ann. 303; *Le Rosen* v. *North Central Texas Oil Co.,* 169 La. 973. Under Article 107 of the Code of Practice all actions for damages to the community property or business must be brought by the husband. See *Mitchell* v. *Dixie Ice Co., supra.* Under most circumstances he alone can create community debts. *Luthy* v. *Phillips Wertein Co.,* 163 La. 753.

The limitations on the husband's power of disposition have been defined in Article 2404, *infra,* as follows:

> He can make no conveyances *inter vivos,* by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage. A gratuitous title within the contemplation of this article embraces all titles wherein there is no direct, material advantage to the donor.
>
> Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons.

> But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one half of the property, on her satisfactorily proving the fraud.

The above-quoted provision makes it clear that the husband can not give away community real estate except for the establishment of the children of the marriage. The situation as to personal property is not so clear, for the first and second paragraphs appear to be in conflict. While no State Court decision reconciling these provisions has been found, it appears that a reasonable construction is that the husband can not give away all or substantially all of the community personal property unless the gift be for the establishment of the children of the marriage, but that, as stated by the District Court (R. 21), "he may nevertheless so dispose of particular objects or things of that class by particular title to whomsoever he may choose."

It is of interest that Article 2404, *infra,* was amended in 1926 by the addition of the explanatory sentence, "A gratuitous title within the contemplation of this article embraces all titles wherein there is no direct, material advantage to the donor." Prior to the addition of this sentence it was held in *Thompson* v. *Societe Catholique D'Education, etc.,* 157 La. 875, that a conveyance was not by a "gratuitous title" where the husband conveyed

community property to a Catholic society conditioned upon the property being used for educational purposes under the direction of the Jesuit Fathers. No case has been found which has been decided since the amendment of 1926, but the amended provision apparently limits the husband's right of disposition, except where disposition by a "gratuitous title" is permitted, to cases where he personally receives a valuable consideration.

In addition to the statutory restraint upon gifts made by the husband he is prohibited by Article 2404, *infra*, from making any disposition of the community property by fraud to injure his wife.

There are no other consequential restrictions upon his power to enjoy and dispose of the community property and income during the existence of the community, unless the fact that he may not assign his wages without his wife's consent is so considered. Act 102 of 1916, *infra*.

All the other checks upon his power arise in connection with the dissolution of the community and will be dealt with in discussing the protection given to the wife.

(B)

THE COMMUNITY PROPERTY IS SUBJECT TO THE PAYMENT OF THE SEPARATE DEBTS OF THE HUSBAND INCURRED DURING THE EXISTENCE OF THE COMMUNITY; BUT IS NOT LIABLE FOR THE DEBTS OF THE WIFE

Article 2403, *infra*.

Kelly v. *Robertson, supra.*

Marshall v. *Mullen and others,* 3 Robinson 328.

Article 2403, *infra*, specifically provides that the community property is not liable for the payment of debts contracted by husband and wife prior to marriage but that "the debts contracted during the marriage * * * must be acquitted out of the common fund."

This provision does not in express terms discriminate between the debts of the husband and the debts of the wife, but no case has been found in which this language has been construed as applying to separate debts incurred by the wife during coverture. This may be explained by the fact that it was not until 1916 that the wife had any independent authority to enter into contracts or to incur obligations with respect to her separate property. See p. 35, *infra*. Her husband was even liable with her for her debts incurred as a public merchant. See Article 131 of the Revised Civil Code, *infra*; *Querouze* v. *Capmartin*, 40 La. Ann. 262.

In view of the restrictions which existed as to the wife's power to contract and to incur obligations when Article 2403, *infra*, was enacted, the better view is that the provision making the community property liable "for the debts contracted during the marriage" did not relate to separate debts of the wife. This was, in fact, conceded by the respondent in the courts below.

The situation is different with respect to the husband. It has always been recognized that the community property may be reached for the payment

of the separate debts of the husband. *Marshall* v. *Mullen and others, supra; Succession of Curtis,* 10 La. Ann. 662. See *Kelly* v. *Robertson, supra,* p. 310; *Succession of M., S. & P. Cason,* 32 La. Ann. 790, 792. The case of *Glenn* v. *Elam,* 3 La. Ann. 611, may at first appear to be *contra,* but it relates to debts of the husband which were incurred before marriage.

The rights of the separate creditors of the husband, however, are subordinated to the creditors of the community. *Thompson* v. *Vance,* 110 La. 26.

(C)

THE HUSBAND AND HIS SEPARATE PROPERTY ARE PERSONALLY LIABLE FOR ALL COMMUNITY DEBTS

Succession of McCloskey, 144 La. 438.
Beck v. *Natalie Oil Co.,* 143 La. 153.
Hawley v. *Crescent City Bank,* 26 La. Ann. 230.

The Supreme Court of Louisiana has unequivocally stated that the husband, as head and master of the community, is personally liable for its debts. *Succession of McCloskey, supra,* p. 445. His separate property may be seized and sold for their satisfaction. In the case of *Hawley* v. *Crescent City Bank, supra,* cited with approval in *Beck* v. *Natalie Oil Co., supra,* the Supreme Court of Louisiana said (p. 232):

> The debts of the community during its existence are the debts of the husband. * * *
>
> Upon the dissolution of the community by the death of the wife, the responsibility of the husband in regard to the community

debts is not changed. He is absolutely and personally bound for their payment; and his separate property may be seized and sold for their acquittal.

The only apparent limitation upon the husband's liability for community debts is that community creditors must proceed first against the community estate before proceeding against the separate estate of the husband. Article 2403 of the Revised Civil Code, *infra; Succession of Lamm*, 40 La. Ann. 312, 315.

There is no conflict between the husband's liability for debts of the community and the doctrine of reimbursement. It is only when he voluntarily enriches the community property at his own expense that he may receive reimbursement and the reimbursement is not for the amount actually expended but for the increase in the value of the community property. *Dillon* v. *Freville, supra; Munchow* v. *Munchow, supra.*

(D)

THE WIFE HAS NO POWER TO MAKE CONTRACTS OR ASSUME OBLIGATIONS RELATING TO THE COMMUNITY PROPERTY NOR TO SUE OR BE SUED WITH RESPECT TO COMMUNITY CLAIMS

Article 121–132 of the Revised Civil Code, *infra.*

Articles 106, 107 and 118 of the Code of Practice, *infra.*

Act 132 of 1926, *infra.*

National City Bank v. *Barringer*, 143 La. 14.

Succession of James, 147 La. 944.

By amendments to the Civil Code and the Code of Practice in 1916, and subsequent years, the wife now has the power to make contracts and to sue and be sued with reference to her separate estate. See Act 132 of 1926, *infra*. This Act specifically provides that it shall not be construed as affecting in any way the matrimonial community of acquets and gains. It has accordingly been held that it did not have any effect on the wife's inability to contract with reference to community property. *Hellberg* v. *Hyland*, 168 La. 493. See *Lorio* v. *Gladney*, 147 La. 930.

There is no other statute giving the wife authority to enter into contracts relating to community property and the Supreme Court of Louisiana has repeatedly held that she has no such power. *Succession of James, supra; National City Bank* v. *Barringer*, 143 La. 14. The general rule is that she cannot contract any debts which will bind the community without her husband's consent. See Articles 121 to 132 of the Revised Civil Code, *infra*; *Gosserand* v. *Monteleone* 164 La. 398, *Fabacher* v. *Rouprich*, 160 La. 433.

In *Hellberg* v. *Hyland*, 168 La. 493, the wife had inherited certain money (her separate property) which she used in making speculations in real estate. In a suit by her to enforce specific performance of a contract for the sale of real estate, the Supreme Court of Louisiana held that the profits derived from that source were community property and that she had no right to use them in the

purchase of real estate without her husband's consent, nor to sue for the enforcement of a contract to sell. In *Mitchell* v. *Dixie Ice Co., supra,* it was held that the wife could not sue for damages to community property even with her husband's consent in view of the provisions of Article 107 of the Code of Practice, *infra.* See also Articles 106 and 118 of the Code of Practice, *infra,* and Act 132 of 1926, *infra.*

It is of interest that damages for personal injuries to the wife constitute her separate property and that she alone may sue for them. Article 2402, *infra.*

An exception which is not made in the statute but has been established through judicial decisions is that when the wife sues the husband for a separation from bed and board the fees of her attorney constitute a charge against the community. *Gosserand* v. *Monteleone, supra.*

The Louisiana Civil Code does not contain any express provision which makes the wife the manager of the community upon abandonment by her husband similar to provisions found in the laws of other community property States. See, however, Articles 57 and 64, *infra.* A limited right to contract for necessities is given to the wife in cases where the husband has failed or refused to furnish them, but it is the husband rather than the community that is made liable. Section 120 of the Revised Civil Code, *infra; Schaeffer* v. *Trascher,* 165 La. 315.

(E)

THE WIFE IS NOT PERSONALLY LIABLE FOR DEBTS OF THE COMMUNITY DURING ITS EXISTENCE AND UPON ITS DISSOLUTION SHE MAY AVOID BECOMING LIABLE FOR ANY PART OF THEM

Articles 126, 127, 128, 2410 of Revised Civil Code, *infra.*
Act 4 of 1882, *infra.*
Act 132 of 1926, *infra.*
Kelly v. *Robertson, supra.*
Successions of M. S. & P. Cason, supra.

In *Ring* v. *Schilkoffsky,* 158 La. 361, it was held that where property upon the security of which the husband and wife executed a joint note and mortgage was community property the debt was a community debt for which the wife could in no way be bound. She can not be made liable for the payment of any community debt so long as the community exists. *Kelly* v. *Robertson, supra; Successions of M. S. & P. Cason, supra.*

Upon the dissolution of the community by death, by divorce, or by separation from bed and board the wife may become personally liable for one-half of the community debts under Article 2409, *infra,* or she may avoid personal liability for the debts of the community in either of two ways. She may renounce the community entirely, in which case she does not become liable for any of the community debts and does not receive any of the community property but retakes all of her separate effects whether dotal or extra-dotal. Articles 2410–2423,

infra; Act 4 of 1882, *infra;* Article 2430, *infra.* She may not renounce, however, if she has taken an active part in the concerns of the community. Article 2412, *infra.* On the other hand she may accept the community property "under the benefit of inventory, in the same manner and with the same benefits and advantages as heirs are allowed by existing laws to accept a succession under the benefit of inventory." Act 4, of 1882, *infra; Phillips* v. *Phillips,* 160 La. 813, *supra.* The language quoted from the Act of 1882 means that the widow may have an inventory made of the community estate and take one-half of the net amount remaining after the payment of all community debts. *Phillips* v. *Phillips, supra; Schreiber* v. *Beer's Widow and Heirs,* 150 La. 676. Obviously, by this means also the widow has it within her power to avoid becoming personally liable for any of the community debts.

In the case at bar it appears that the wife at the husband's instance and with his approval reported one-half of the community income and that the tax on the income as reported was paid by the husband out of community funds.

(F)

WHILE UNDER CERTAIN CIRCUMSTANCES THE WIFE MAY BRING THE COMMUNITY TO AN END AND SECURE A DIVISION OF COMMUNITY PROPERTY, SHE CAN NOT DURING THE EXISTENCE OF THE COMMUNITY SUBSTITUTE HER MANAGEMENT FOR THAT OF THE HUSBAND OR DEMAND ANY PART OF THE COMMUNITY INCOME FOR HER OWN USE

Articles 123, 150, 155, 160, 2408, 2410, 2425, 2430, 2446, Revised Civil Code, *infra.*
Article 105 of Code of Practice, *infra.*
Gastauer v. *Gastauer,* 131 La. 1.
Viguerie v. *Viguerie,* 133 La. 406.

The effect of a separation from bed and board or a divorce is that it brings the community of acquets and gains to an end. Articles 123, 150, 155, 156, *infra.* In *Giglio* v. *Giglio,* 159 La. 46, it was held that when a divorce decree becomes final the husband and wife become co-owners with equal undivided interests in the community property and either of them has the right to provoke a judicial partition.

In the partition of property upon separation from bed and board or upon divorce, the wife will have restored to her one-half of the community property and will be subject to the payment of one-half of the community debts providing she does not renounce the community or accept it under benefit of inventory with the result, previously mentioned, of receiving only one-half of the residue of the community property remaining after the payment of

debts. As previously pointed out, the court has no discretion in the division of property between the two spouses. If there is a division, it must be equal except for the necessity of taking into consideration the principle of enrichment discussed heretofore. Article 2408, *infra.*

Independently of an action for divorce or of separation from bed and board, the wife may, under Article 2425, *infra,* petition for a separation of property where her dowry is in danger owing to her husband's mismanagement or otherwise or "when the disorder of his affairs induces her to believe that his estate may not be sufficient to meet her rights and claims."

While this provision does not in terms relate to a case where the husband is mismanaging the community funds, the Supreme Court of Louisiana has evidently considered that the provision should be liberally construed and that even in the absence of separate property the wife may secure relief whenever the husband's mismanagement puts her present or eventual rights in peril. *Gastauer* v. *Gastauer,* 131 La. 1, 7; *Jones* v. *Jones,* 119 La. 677.

The effect of the separation of property, however, is to terminate the community of acquets and gains as permanently as if there were a divorce. *Snoddy* v. *Brashear,* 13 La. Ann. 469. It does not substitute her management over the community property for that of her husband. It ends the community, and, if she does not renounce the com-

munity, puts into her control as her separate property her share of the then existing community estate.

Nor is there any other more immediate remedy afforded the wife in the event that her husband mismanages the community property. It is true that she may obtain an injunction to restrain him from disposing of the community property pending an action for separation of property, separation from bed and board or divorce. Article 298 of the Code of Practice, *infra.* See also Article 150 of the Revised Civil Code, *infra.* This protection is limited and is anticipatory of the dissolution of the community.

Section 2404 of the Revised Civil Code, *infra,* also prohibits the husband from disposing of the community property with intent to defraud the wife, but she has no present remedy against him in such cases. The statute merely gives her the right to recover the value of the alienated property upon his death. Article 2404, *infra;* See *Dixon* v. *Dixon's Ex.,* 4 La. 188. In *Smallwood* v. *Pratt,* 3 Robinson 132, it is suggested that upon separation from bed and board the wife would have a remedy against the husband during his lifetime for his fraudulent disposition. In either case it is *only upon the dissolution of the community* that the wife can maintain an action against him or his heirs.

There is no statutory action by which the wife during the existence of the community may sue her

husband to recover her share of the community property without putting an end to the community. There is no procedure by which she may compel him to pay over to her a portion of the community income as it is earned or assume the management of her half of the community property. The wife's power to sue her husband is a limited one in Louisiana and it can not be enlarged beyond the statute. Article 105 of the Code of Practice, *infra; Viguerie* v. *Viguerie, supra.*

We submit that the restraints which the wife may place upon her husband's disposition of community funds may be exercised only with a view to the dissolution of the community and that she does not have a right to interfere actively with her husband's control and enjoyment of the community property and income during its existence. While the fact that she may sue him for a separation of property may to a limited extent act as a curb upon the husband, it does not in fact constitute a present and immediate interference.

(G)

SUMMARY

We submit that, under the Louisiana statutes and decisions, during the existence of the community the husband has the exclusive right to manage the community property and the income therefrom and to dispose of the same, subject only to a

limitation as to gifts and as to alienation of community property with intent to defraud his wife.

The husband is more closely identified with the community than the wife, for the community property may be reached for the payment of his separate debts and he and his separate property are at all times liable for the payment of the community debts. On the other hand, the community property is not liable for the payment of the separate debts of the wife; she has no liability for the community debts during the existence of the community and may avoid liability after its dissolution.

The wife has no positive powers of dominion over the community property and income during the existence of the community. Her only recourse against the husband's mismanagement is to bring the community to an end through securing a divorce, a separation from bed and board or a separation of property. Nor does she have a remedy against his fraud until the dissolution of the community.

The wife's power to bring the community to an end is not a present right to control and enjoy the community income, the taxation of which is involved in this case. We submit that the wife's so-called vested interest in the community property is no more than the right, if she so elects, to receive upon the dissolution of the community one-half of the then existing community property subject to

adjustments for enrichment and fraudulent or invalid alienations of the husband or to have her interest pass to her heirs or devisee. She cannot transfer by will or claim in separation a half interest in any particular thing but only a half interest in the property existing at the termination of the community, subject to the payment of debts.

But as we pointed out in our brief in the case of *Poe* v. *Seaborn, supra,* the case is not to be decided according to the extent of the negative control of the wife over the community property, or her technical present interest in it, or the ultimate rights that may vest upon dissolution of the community. Neither the corpus of the community property nor the rights of the respective spouses are the subject of the tax. The tax is based on the current receipt of income and, if it is to produce "practical results," it must be imposed upon him who has the right to receive and dispose of the income. In the State of Louisiana that person is the husband, however the community fund may upon dissolution be affected by the interest of the wife.

The attention of the Court is directed to the case of *Zemurray* v. *United States,* 64 C. Cls. 657, certiorari denied, 278 U. S. 600. In that case, which involved Louisiana community income for 1917 and 1918, the Court of Claims held that under the Louisiana law community income was under the complete control of the husband, and that, therefore, under the *Robbins case,* the entire community income was properly taxed to the husband.

CONCLUSION

The decision of the Circuit Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted.

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SEPTEMBER, 1930.

APPENDIX

UNITED STATES STATUTES

The Revenue Act of 1926, c. 27, 44 Stat. 9, 21–22, 37, 130, provides in part as follows:

> SEC. 210. (a) In lieu of the tax imposed by section 210 of the Revenue Act of 1924, there shall be levied, collected, and paid for each taxable year upon the net income of every individual (except as provided in subdivision (b) of this section) a normal tax of 5 per centum of the amount of the net income in excess of the credits provided in section 216, except that in the case of a citizen or resident of the United States the rate upon the first $4,000 of such excess amount shall be 1½ per centum, and upon the next $4,000 of such excess amount shall be 3 per centum; * * *. (U. S. C. App., Title 26, Sec. 951.)
>
> SEC. 211. (a) In lieu of the tax imposed by section 211 of the Revenue Act of 1924, but in addition to the normal tax imposed by section 210 of this Act, there shall be levied, collected, and paid for each taxable year upon the net income of every individual a surtax as follows: * * *. (U. S. C. App., Title 26, Sec. 952.)
>
> SEC. 223. (a) The following individuals shall each make under oath a return stating specifically the items of his gross income and

the deductions and credits allowed under this title—

(1) Every individual having a net income for the taxable year of $1,500 or over, if single, or if married and not living with husband or wife;

(2) Every individual having a net income for the taxable year of $3,500 or over, if married and living with husband or wife; and

(3) Every individual having a gross income for the taxable year of $5,000 or over, regardless of the amount of his net income.

(b) If a husband and wife living together have an aggregate net income for the taxable year of $3,500 or over, or an aggregate gross income for such year of $5,000 or over—

(1) Each shall make such a return, or

(2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income.

(c) If the taxpayer is unable to make his own return, the return shall be made by a duly authorized agent or by the guardian or other person charged with the care of the person or property of such taxpayer. (U. S. C., App., Title 26, Sec. 964.)

SEC. 1212. Income for any period before January 1, 1925, of a marital community in the income of which the wife has a vested interest as distinguished from an expectancy, shall be held to be correctly returned if returned by the spouse to whom the income belonged under the State law applicable to such marital community for such period.

Any spouse who elected so to return such income shall not be entitled to any credit or refund on the ground that such income should have been returned by the other spouse. (U. S. C. App., Title 26, Sec. 964 a.)

LOUISIANA STATUTES

Louisiana Revised Civil Code, 1870:

ART. 57. When a person shall not have appeared at the place of his domicile or habitual residence, and when such person shall not have been heard of, for five years, his presumptive heirs, may, by producing proof of the fact, cause themselves to be put by the competent judge into provisional possession of the estate which belonged to the absentee at the time of his departure, or at the time he was heard of last, on condition of their giving security for their administration.

ART. 64. The husband or wife of the absentee, who is not separated in estate from him or her, and who wishes to continue to enjoy the benefit of the community or partnership of matrimonial gains, which existed between them, may prevent the provisional possession or exercise of all the rights which may depend upon the death of the absentee, and claim and preserve for himself or herself in preference to any other person, the administration of the estate of his or her absent husband or wife.

If on the contrary the husband or wife of the absentee chooses rather to have the

community dissolved, he or she may exercise and claim all his or her rights, both legal and conventional, on his or her giving security for such things as may be liable to be restored.

The wife who elects to have the community continued, has, notwithstanding, the right of renouncing it afterwards.

ART. 120. The wife is bound to live with her husband and to follow him wherever he chooses to reside; the husband is obliged to receive her and to furnish her with whatever is required for the convenience of life, in proportion to his means and condition.

ART. 121. The wife can not appear in court without the authority of her husband, although she may be a public merchant, or possess her property separate from her husband.

ART. 122. The wife, even when she is separate in estate from her husband, can not alienate, grant, mortgage, acquire, either by gratuitous or incumbered title, unless her husband concurs in the act, or yields his consent in writing.

ART. 123. The woman separated from bed and board has no need in any case of the authorization of her husband, as this separation carries with it not only a separation of property, but a dissolution of the community of acquets and gains.

ART. 124. If the husband refuses to empower his wife to appear in court, the judge may give such authority.

ART. 125. If the husband refuses to empower his wife to contract, the wife may cause him to be cited to appear before the judge, who may authorize her to make such contract, or refuse to empower her, after the husband has been heard, or has made default.

ART. 126. A married women over the age of twenty-one years, may, by and with the authorization of her husband, and with the sanction of the judge, borrow money or contract debts for her separate benefit and advantage, and to secure the same grant mortgages or other securities affecting her separate estate, paraphernal or dotal.

ART. 127. In carrying out the power to borrow money or contract debts, the wife, in order to bind herself or her paraphernal or dotal property, must, according to the amount involved, be examined, at chambers by the judge of the district or parish in which she resides, separate and apart from her husband, touching the objects for which the money is to be borrowed or debt contracted, and if he shall ascertain either the one or the other are for her husband's debts or for his separate benefit or advantage, or for the benefit of his separate estate, or of the community, the said judge shall not give his sanction authorizing the wife to perform the acts or incur the liabilities set forth in article 126.

ART. 128. If the wife shall satisfy the judge that the money about to be borrowed

or debt contracted is solely for her separate advantage, or for the benefit of her paraphernal or dotal property, then the judge shall furnish her with a certificate setting forth his having made such examination of the wife as is required by article 127, which certificate, on presentation to a notary, shall be his authority for drawing an act of mortgage, or other act which may be required for the security of the debt contracted, and shall be annexed to the act, which act, when executed as herein prescribed, shall furnish full proof against her and her heirs, and be as binding in law and equity in all courts of this State, and have the same effect as if made by a *femme sole*.

ART. 131. If the wife is a public merchant, she may, without being empowered by her husband, obligate herself in any thing relating to her trade; and in such case, her husband is bound also, if there exists a community of property between them.

She is considered as a public merchant, if she carries on a separate trade, but not if she retails only the merchandise belonging to the commerce carried on by her husband.

ART. 132. If the husband is under interdiction or absent, the judge may, when satisfied of the fact, authorize the wife to sue or be sued, or to make contracts.

ART. 149. During the suit for separation, the wife may, for the preservation of her rights, require an inventory and appraisement to be made for the movables and im-

movables which are in possession of her husband, and an injunction restraining him from disposing of any part thereof in any manner.

ART. 150. From the day on which the action of separation shall be brought, it shall not be lawful for the husband to contract any debt on account of the community, nor to dispose of the immovables belonging to the same, and any alienation by him made after that time, shall be null, if it be proved that such alienation was made with the fraudulent view of injuring the rights of the wife.

ART. 155. Separation from bed and board carries with it separation of goods and effects.

ART. 156. In case of separation from bed and board, the party against whom it shall have been pronounced, shall lose all the advantages or donations, the other party may have conferred by the marriage contract or since, and the party at whose instance the separation has been obtained, shall preserve all those to which such party would have been entitled; and these dispositions are to take place even in case the advantages and donations were reciprocally made.

ART. 159. The effects of a divorce shall not only be the same as are determined in the case of a separation from bed and board, but it shall also dissolve forever the bonds of matrimony, between the parties, and place them in the same situation with respect to each other as if no marriage had ever been contracted between them.

ART. 160 (as amended).[1] If the wife who has obtained the divorce, has not sufficient means for her maintenance, the court may allow her, in its discretion, out of the property and earnings of her husband, alimony which shall not exceed one-third of his income.

This alimony shall be revocable in case it should become unnecessary, and in case the wife should contract a second marriage.

ART. 915 (as amended).[2] When either husband or wife shall die, leaving neither a father nor mother, nor descendants, and without having disposed by last will and testament, of his or her share of the community property, such undisposed of share shall be inherited by the surviving spouse in full ownership. In the event the deceased leave descendants, his or her share in the community estate shall be inherited by such descendants in the manner provided by law. Should the deceased leave no descendants, but a father and mother, or either, then the share of the deceased in the community estate shall be divided in two equal portions, one of which will go to the father and mother, or the survivor of them, and the other portion shall go to the surviving spouse.

ART. 916. In all cases, when the predeceased husband or wife shall have left issue of the marriage with the survivor, and shall not have disposed by last will and testament,

[1] Amended by Act 247, Acts of Louisiana, 1916, p. 521.

[2] Amended Act 160 of Acts of Louisiana, 1920, pp. 250–251.

of his or her share in the community property, the survivor shall hold a usufruct, during his or her natural life, so much of the share of the deceased in such community property as may be inherited by such issue. This usufruct shall cease, however, whenever the survivor shall enter into a second marriage.

ART. 917. When the deceased has left neither lawful descendants, nor lawful ascendants, nor collateral relations, the law calls to his inheritance either the surviving husband or wife, or his or her natural children, or the State, in the manner and order hereafter directed.

ART. 2332. The partnership, or community of aquets or gains, needs not to be stipulated; it exists by operation of law, in all cases where there is no stipulation to the contrary.

But the parties may modify or limit it; they may even agree that it shall not exist.

ART. 2334 (as amended).[3] The property of married persons is divided into separate and common property.

Separate property is that which either party brings into the marriage, or acquires during the marriage with separate funds or by inheritance, or by donation made to him or her particularly.

The earnings of the wife when living separate and apart from her husband although not separated by judgment of court, her earnings when carrying on a business, trade,

[3] Amended Act 186 of Acts of Louisiana, 1920, pp. 304–305.

occupation or industry separate from her husband, actions for damages resulting from offenses and quasi offenses, and the property purchased with all funds thus derived, are her separate property.

Actions for damages resulting from offenses and quasi offenses suffered by the husband, living separate and apart from his wife by reason of fault on her part, sufficient for separation or divorce shall be his separate property.

Common property is that which is acquired by the husband and wife during marriage, in any manner different from that above declared. But when the title to community property stands in the name of the wife, it cannot be mortgaged or sold by the husband without her written authority or consent.

ART. 2383. All property, which is not declared to be brought in marriage by the wife, or to be given to her in consideration of the marriage or to belong to her at the time of marriage, is paraphernal.

ART. 2386. When the paraphernal property is administered by the husband, or by him and the wife indifferently, the fruits of his property, whether natural, civil, or the result of labor, belong to the conjugal partnership, if there exist a community of gains. If there do not, each party enjoys, as he chooses, that which comes to his hand; but the fruits and revenues which are existing at the dissolution of the marriage, belong to the owner of the thing which produced them.

ART. 2392. Married persons may stipulate that there shall be no partnership between them.

ART. 2393. In this case, the wife preserves the entire administration of her movable and immovable property, and the free enjoyment of her revenues.

ART. 2394. She may alienate her movable and immovable property, in the manner and in the cases above provided for with respect to paraphernal property.

ART. 2395. Each of the married persons separate in property, contributes to the expenses of the marriage in the manner agreed on by their contract; if there be no agreement on the subject, the wife contributes to the amount of one-half of her income.

ART. 2396. When the wife, who is separate in property, has left the enjoyment of her property to her husband without any procuration, he is not answerable for the fruits, until a demand of them be made by his wife, or if it is not made, until the dissolution of the marriage. He is not accountable for the fruits which have been previously consumed.

ART. 2397. The wife, whether separated in property by contract or judgment, or not separated, cannot, except by and with the authorization of the husband, and in default of the husband, with that of the judge, alienate her immovable effects of whatever nature they may be, except in cases where the alienation of the dotal immovable is permitted.

ART. 2398. The wife, whether separated in property by contract or by judgment, or not separated, cannot bind herself for her husband, nor conjointly with him, for debts contracted by him before or during the marriage.

ART. 2399. Every marriage contracted in this State, superinduces of right partnership **or community of acquets or gains, if there** be no stipulation to the contrary.

ART. 2400. All property acquired in this State by non-resident married persons, whether the title thereto be in the name of either the husband or wife, or in their joint names, shall be subject to the same provisions of law which regulate the community of acquets and gains between citizens of this State.

ART. 2401. A marriage, contracted out of this State, between persons who afterwards come here to live, is also subjected to community of acquets, with respect to such property as is acquired after their arrival.

ART. 2402 (as amended).[4] This partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estate which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even

[4] As amended by Act 68, Acts of Louisiana, 1902, p. 95.

although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase. But damages resulting from personal injuries to the wife shall not form part of this community, but shall always be and remain the separate property of the wife and recoverable by herself alone; provided where the injuries sustained by the wife result in her death, the right to recover damages shall be as now provided for by existing laws."

ART. 2403. In the same manner, the debts contracted during the marriage enter into the partnership or community of gains, and must be acquitted out of the common fund, whilst the debts of both husband and wife, anterior to the marriage, must be acquitted out of their own personal and individual effects.

ART. 2404.[5] The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

He can make no conveyances *inter vivos*, by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the mar-

[5] As amended by Act 96, Acts of Louisiana, Reg. Sess., 1926, p. 136.

riage. A gratuitious title within the contemplation of this article embraces all titles wherein there is no direct, material advantage to the donor.

Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons.

But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one half of the property, on her satisfactorily proving the fraud.

ART. 2405. At the time of the dissolution of the marriage, all effects which both husband and wife reciprocally possess, are presumed common effects or gains, unless it be satisfactorily proved which of such effects they brought in marriage, or which have been given them separately, or which they have respectively inherited.

ART. 2406. The effects which compose the partnership or community of gains, are divided into two equal portions between the husband and the wife, or between their heirs, at the dissolution of the marriage; and it is the same with respect to the profits arising from the effects which both husband and wife brought reciprocally in marriage, and which have been administered by the husband, or by husband and wife conjointly, although what has been thus brought in marriage, by either the husband or the wife, be more considerable than what has been brought by the

other, or even although one of the two did not bring anything at all.

ART. 2407. The fruits hanging by the roots on the lands belonging separately to either the husband or the wife, at the time of the dissolution of the marriage, are equally divided between the husband and the wife or their heirs. It is the same with respect to the young of cattle yet in gestation.

The fruits of the paraphernal effects of which the wife reserved to herself the enjoyment, are excepted from the rule contained in this article.

ART. 2408. When the separate property of either the husband or the wife has been increased or improved during the marriage, the other spouse, or his or her heirs, shall be entitled to the reward of one-half of the value of the increase or ameliorations, if it be proved that the increase of ameliorations be the result of the common labor, expenses, or industry; but there shall be no reward due, if it be proved that the increase is due only to the ordinary course of things, to the rise in the value of property, or to the chances of trade.

ART. 2409. It is understood that, in the partition of the effects of the partnerhip or community of gains, both husband and wife are to be equally liable for their share of the debts contracted during the marriage, and not acquitted at the time of its dissolution.

ART. 2410 (as amended).[6] Both the wife and her heirs or assigns have the privilege

[6] See Act 4 of 1882, *infra* p. 68.

of being able to exonerate themselves from the debts contracted during the marriage, by renouncing the partnership of community of gains.

ART. 2411. The wife, who renounces, loses every sort of right to the effects of the partnership or community of gains.

But she takes back all her effects, whether dotal or extradotal.

ART. 2412. The wife who has taken an active concern in the effects of the community, cannot renounce the same.

Acts which are simply administrative or conservatory, do not come, in this article, under the denomination of active concern.

ART. 2413. The surviving wife, who wishes to preserve the power of renouncing the community of gains, must make an inventory within the delays and with the formalities prescribed for the beneficiary heir.

ART. 2414. She ought also to make her renunciation within the same delays which are allowed for the beneficiary heir to explain his intentions.

After the expiration of these delays, she may be, in the same manner, forced to make her decision, and judgment may be rendered against her as a partner, unless she renounces.

ART. 2417. The widow, above the age of majority, who has allowed a judgment to pass against her as a partner, by a court of general jurisdiction, shall lose the power of renouncing.

ART. 2418. The widow who has concealed or made away with any of the effects of the partnership or community of gains, is declared to be a partner in community, notwithstanding her renunciation. It is the same with respect to her heirs.

ART. 2420.[7] The wife, separated from bed and board, who has not within the delays above fixed, to begin from the separation finally pronounced, accepted the community, is supposed to have renounced the same; unless, being still within the term, she has obtained a prolongation from the judge, after the husband was heard or after he was duly summoned.

ART. 2421. The creditors of the wife may attack the renunciation, which may have been made by her or by her heirs with a view to defraud her creditors, and accept the community of gains in their own names.

ART. 2422. The widow, whether she accept or renounce, has a right, during the delays which are granted to her to make an inventory and deliberate, to receive her maintenance and that of her servants out of the provisions in store; and if there be none, she has a right to borrow on account of the common stock, on the condition, however, of using the privilege with moderation.

She owes no rent for the residence she may have made, during such term, in a house appertaining to the community or belonging to

[7] Repealed by Act No. 49, Acts of Louisiana, Reg. Sess., 1926, p. 63.

the heirs of the husband; and if the house, which both husband and wife did inhabit at the time of the dissolution of the marriage, was rented by them, the wife shall not contribute, during the same term, to the payment of the rent, which shall be taken out of what belongs to the whole.

ART. 2423. In case of the dissolution of the marriage by the death of the wife, her heirs may renounce the partnership or community of gains, within the term and according to the forms which the law prescribes to the surviving wife.

ART. 2424. Married persons may, by their marriage, contract, modify the legal community, as they think fit, either by agreeing that the portions shall be unequal, or by specifying the property, belonging to either of them, of which the fruits shall not enter into the partnership.

ART. 2425. The wife may, during the marriage, petition against the husband for a separation of property, whenever her dowry is in danger, owing to a mismanagement of her husband, or otherwise, or when the disorder of his affairs induces her to believe that his estate may not be sufficient to meet her rights and claims.

ART. 2430. The wife, who has obtained the separation of property, may, nevertheless, accept the partnership or community of gains, which has existed till that time, if it be her interest so to do, and upon her contributing, in case of acceptance, to pay the common debts.

She retakes, also, her dowry and all she brought in marriage, or which she acquired separately during the marriage by inheritance or otherwise.

Louisiana Code of Practice, 1870:

ART. 105. A married woman can not sue her husband as long as the marriage continues, except it be to obtain a separation from bed and board, or for the separation of property, or for the restitution and enjoyment of her paraphernal property, or in case she holds her property separate from him by her marriage contract, or for divorce; but in no case can she sue her husband without the authorization of the court before which she brings her action.

ART. 106.[8] A married woman, whether she be of age or a minor, can not appear in court against any one without the authorization of her husband, although she may be a public merchant, carrying on her trade separate from him, unless she has obtained a separation from bed and board by virtue of a judgment duly executed, or has been regularly divorced.

ART. 107. Husbands have under their control the personal and possessory actions to which their wives are entitled, though they be themselves minors; therefore they can proceed judicially, and in their own name, in whatever relates to the preservation of the dotal property which their wives have

[8] Repealed in 1926 and replaced by Act 132 of 1926, *infra*, p. 68.

brought to them by marriage, as well as to the recovering of the debts due them, these being under their administration.

But actions relating to the ownership of the dotal or paraphernal property of the wife, or of some real right belonging to her, must be brought by the wife, duly authorized by her husband, or by the judge if he fails to do it.

ART. 118.[9] When one intends to sue a married woman for a cause of action relative to her own separate interest, the suit must be brought both against her and her husband.

Should her husband be absent, the plaintiff must demand that she be authorized by the judge before whom the suit is brought to defend it alone.

Nevertheless, if she be divorced or separated from her husband, from bed and board, by a judgment duly executed, she may be sued alone without the authorization of her husband or of the judge being required.

ART. 298. The injunction must be granted, and directed against the defendant himself, in the following cases:

* * * * *

6. When a woman has sued her husband for a separation of property, or for a separation from bed and board, and fears that he will, during the pendency of the suit, dispose, to her prejudice, of the property either held in the community or on which she has a privilege for her dotal rights.

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[9] Repealed in 1926 and replaced by Act 132 of 1926, *infra*.

* * * * *

Act 4, Acts of Louisiana, 1882, pp. 5–6:

(Title Omitted)

Be it enacted by the General Assembly of the State of Louisiana, That at the dissolution for any cause of marriage community, it shall be lawful for the wife to accept the community of acquets and gains under the benefit of inventory, in the same manner and with the same benefits and advantages as heirs are allowed by existing laws to accept a succession under benefit of inventory.

Act 102, Acts of Louisiana, 1916, p. 223:

(Title Omitted)

* * * * *

SECTION 9. Be it further enacted, etc., That no assignment of or order for wages or salaries to be earned in the future shall be valid when made by married men, unless the written consent of his wife to the making of such assignment or order is attached thereto; provided, that where a married man is living separate and apart from his wife for a period of five months prior to such assignment or the giving of such order, then such consent shall not be required.

Act 132, Acts of Louisiana, Reg. Sess., 1926, pp. 207–208:

(Title Omitted)

SECTION 1. Be it enacted by the Legislature of Louisiana, That a married woman,

whether a resident of this State or not, shall be competent to contract debts, purchase, sell and mortgage and to bind and obligate herself personally and with reference to her separate and paraphernal property; to appear in court and to sue and be sued; to sell, alienate or otherwise dispose and to mortgage and pledge or otherwise encumber her separate and paraphernal property for the benefit of herself, her husband or any other person, and to bind and obligate herself personally or as surety for her husband or any other person.

SECTION 2. That such married women shall exercise the rights granted by Section 1, hereof, without the necessity of obtaining the authority of her husband or the judge.

SECTION 3. That the rights hereby granted shall not apply to married women under the age of eighteen years or to married women who are interdicted.

SECTION 4. That nothing herein contained shall be deemed or construed to affect in any way the statutes of this State establishing and regulating the matrimonial community of acquets and gains, and prescribing what shall be deemed separate property of the spouses.

SECTION 5. That all laws or parts of laws in conflict herewith, be and the same are hereby repealed.

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